SUPREME COURT, U. S.

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75-3601

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

HENRY FORREST MARSHALL,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	ii
OPINIONS BELOW	2
QUESTIONS PRESENTED	4
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	20
1. Issues Arising Under the Wharton Rule—Buyer-Seller Transaction Not a Conspiracy	20
2. Prosecutor Requiring Defendant to Read Prejudicial Statement in Federal Firearms Transaction Record Required Granting of Motion for Mistrial	47
CONCLUSION	57
CERTIFICATE OF SERVICE	58

APPENDICES

Opinion Below	A
Judgment of Fifth Circuit	B
Denial of Petition for Rehearing and Petition for Rehearing *En Banc*	C

TABLE OF AUTHORITIES CITED

Page

CASES CITED

Blumenthal v. United States, 332 U.S. 539 (1947) 43
Chadwick v. United States, 72 C.C.A. 343, 141 Fed. 225 (6 Cir. 1905) 27, 28
Davis v. United States, 279 F.2d 576 (4 Cir. 1960) 34, 40
Direct Sales Co. v. United States, 319 U.S. 703 (1943) 31, 32, 34
Gebardi v. United States, 287 U.S. 112 (1932) 25, 30, 33
Hyde v. United States, 15 F.2d 816 (4 Cir. 1926) 45
Iannelli v. United States, 420 U.S. ---, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975) 21, 23, 24, 26
People v. Purcell, 304 Ill.App. 215, 26 N.E.2d 153 (1940) 36, 43
People v. Wettengel, 98 Colo. 193, 58 P.2d 279 (1935) 36, 43
Perez v. United States, 297 F.2d 12 (5 Cir. 1961) 45
Tatum v. United States, 190 F.2d 612 (D.C.Cir. 1951) 45
United States v. Apollo, 476 F.2d 156 (5 Cir. 1973) 38, 39, 40, 41, 42
United States v. Braico, 422 F.2d 543 (7 Cir. 1970) 35, 36, 43
United States v. Brown, 495 F.2d 593 (1 Cir. 1974) 35
United States v. Dietrich, 126 Fed. 664 (D.Neb. 1904) 27, 28, 29, 31
United States v. Falcone, 311 U.S. 205 (1940) 31, 32
United States v. Ford, 324 F.2d 950 (7 Cir. 1963) 35
United States v. Katz, 271 U.S. 354 (1926) 27, 33
United States v. Koch, 113 F.2d 982 (2 Cir. 1940) 35
United States v. N.Y.Cent. & H.R.R. Co., 146 Fed. 298 (S.D.N.Y. 1906) 27, 28, 29, 43

Page

TABLE OF AUTHORITIES CITED (Continued)

CASES CITED (Continued):

United States v. Pacheco, 489 F.2d 554 (5 Cir. 1974) 38
United States v. Varelli, 407 F.2d 735 (7 Cir. 1969) 35, 36, 43
United States v. Zeuli, 137 F.2d 845 (2 Cir. 1943) 33
Vannata v. United States, 289 Fed. 424 (2 Cir. 1923) 27, 28

STATUTES & RULES OF CRIMINAL PROCEDURE CITED

United States Code:

18 U.S.C. § 3231 3
21 U.S.C. § 841(a)(1) 3, 5, 25
21 U.S.C. § 846 3, 5, 6, 25
28 U.S.C. § 1254(1) 3

Federal Rules of Criminal Procedure:

Rule 26, F.R.Cr.P. 5, 6, 56, 57
Rule 29(a), F.R.Cr.P. 5, 6, 44

TREATISES CITED

1 Anderson, *Wharton's Criminal Law and Procedure* § 89 21, 22, 23, 25
2 F. Wharton, *Criminal Law* §1604 (12th ed.) 21, 36
2 F. Wharton, *Criminal Law* § 1339 (10th ed.) 31

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Henry Forrest Marshall, through his undersigned counsel, prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the opinion and judgment of the said Court of Appeals which was rendered on May 27, 1975, affirming a judgment of conviction

QUESTIONS PRESENTED

1. Whether the evidence showed a conspiracy to distribute cocaine, as alleged, when the evidence, viewed in the light most favorable to the Government, demonstrated at best that Petitioner Marshall was a cocaine supplier who sold cocaine to Robert Dempsey, III, on three occasions, to Booker T. Howard, Jr., individually, on one occasion, and to Booker T. Howard, Jr., Freddie Smith (an individual cooperating with the Drug Enforcement Administration), and an agent of the D.E.A. in one two-step transaction.

2. Whether the Trial Court committed reversible error when it refused to instruct the jury in accordance with petitioner's theory of defense to the conspiracy charge that no conspiracy to distribute narcotics is shown by the mere fact that on one or more occasions one person bought narcotics from another since the participation of a buyer and seller is required to consummate the act which is the supposed object of the alleged conspiracy.

3. Whether petitioner was entitled to have a mistrial declared when the Government, in the guise

of impeaching the petitioner's credibility, required the petitioner to identify his signature on four Federal Firearm Transactions Records, asked him if he had not answered on the said forms that he was not a "user" of narcotics at a point subsequent in time to the point he had testified at trial that he had used cocaine, and then, unnecessarily, required petitioner to read aloud the following statement which was subscribed by him on the four Federal Firearms Transaction Record forms:

> I hereby certify that the answers to the above are true and correct. I understand that a person who answers any of the above questions in the affirmative is prohibited by Federal law from purchasing and/or possessing a firearm. * * *

STATUTES AND RULES OF CRIMINAL PROCEDURE INVOLVED

This case involves the construction and application of 21 U.S.C. §§ 841(a)(1) and 846 and Rules 26 and 29(a) of the Federal Rules of Criminal Procedure.

Title 21, United States Code, § 841(a)(1), in relevant part, provides:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

they were transacting with petitioner, a sample of the contraband product for inspection prior to the consummation of the sales transaction. The quantity later sold following the delivery of the sample was made the subject of a separate charge of distribution.

As to the transactions between petitioner and Booker T. Howard, Jr., there was no evidence showing any involvement with Robert Dempsey, III. Likewise, as between petitioner and Robert Dempsey, III, there was no evidence demonstrating any involvement with Booker T. Howard, Jr. Dempsey and Howard were merely separate customers of petitioner who were incidentally concurrently purchasing cocaine from petitioner.

No substantive offenses were alleged against Robert Dempsey, III, in the present indictment because the Government had previously indicted him and negotiated a guilty plea on the said offenses at a time when the conspiracy charge herein was not pending, although the Government then possessed all information upon which the present indictment was

based.

The evidence, taken in the light most favorable to the Government, proved that on each of the three occasions mentioned in the indictment when Robert Dempsey, III distributed cocaine, he visited Petitioner Marshall before delivering the contraband. The jury reasonably concluded that Marshall was the source of the cocaine ultimately distributed by Dempsey upon this evidence. For reasons which will become obvious later in this petition, a discussion of the terms of the transactions between petitioner and Dempsey, as proved in the Trial Court, is pertinent. On each of these occasions, Robert Dempsey, III merely purchased cocaine from petitioner and resold it to others. There was no evidence of any consignment type arrangement between petitioner and Dempsey. There was no arrangement shown between Dempsey and petitioner that petitioner would obtain cocaine and Dempsey would distribute it. And even on some occasions, Dempsey was shown to have made arrangements to sell cocaine but was unable to conclude those sales because petitioner was out of

cocaine and Dempsey could not obtain it elsewhere. The evidence merely showed that Dempsey, being a cautious person, did not purchase cocaine until he had arranged for a resale of the amount he then obtained. The number of occasions when, after arranging a resale, Dempsey had to obtain cocaine from someone other than petitioner was not made an issue and did not come out on the trial of this cause. Dempsey asserted his privilege as a defendant to refuse to testify in the joint trial of this indictment. With respect to the transactions between petitioner and Dempsey, petitioner was not shown to have been involved with Dempsey's distributees.

Petitioner did become involved with Booker T. Howard, Jr.'s distributees. The terms of the transactions between petitioner and Howard differed from those between petitioner and Dempsey in the following ways. Petitioner had formerly lived in Chicago, Illinois, where he knew Booker T. Howard, Jr., who was then a policeman in Gary, Indiana. Petitioner had apparently distributed cocaine to Howard prior

to petitioner moving to New Orleans. Quite a while after petitioner moved to New Orleans, he was contacted by Howard and a sale of cocaine was arranged and consummated. Howard took the cocaine he had obtained from petitioner, returned to the Chicago area, and sold it in Chicago. Howard was subsequently contacted by Freddie Smith, who Howard had previously known to be a fugitive from justice but who was then a cooperating individual working with the Drug Enforcement Administration. Smith desired to obtain some cocaine from Howard. Howard was then out of the cocaine he had obtained from petitioner. He sold some cocaine to Smith which he had obtained in the Chicago area. The cocaine Howard had obtained in Chicago was of low quality. Howard said he could obtain higher quality cocaine from someone in New Orleans.

Naturally, when Howard said he could obtain better cocaine in New Orleans, the D.E.A. Agent with whom Smith was working wanted to set up a controlled purchase and discover Howard's New Orleans connection. As a result of the request of Smith and Agent Brown, Howard communicated with petitioner and arranged to

make a purchase of cocaine from petitioner. In spite of the claim in the indictment that petitioner and Howard were conspirators in the sale of cocaine to the cooperating individual and the undercover agent, the evidence came out differently. The evidence showed that Howard was the purchasing agent for the cooperating individual and undercover agent. This is most graphically demonstrated by the fact that, when the purchase was consummated, the undercover agent paid Howard $200.00 for arranging the purchase.

The evidence in this record is totally devoid of any showing greater than that petitioner was a seller of concaine; that his customers, Dempsey and Howard, resold the cocaine they bought from petitioner and they did so on more than one occasion. Dempsey and Howard were separate customers whose paths incidentally crossed during these contemporaneous transactions, but they were never shown to have had any common participation, stake in each other's venture, and only a similar objective, *i.e.*, to buy cocaine from petitioner and others and to resell it.

During the course of the trial of this cause, petitioner testified in his own defense. During his testimony, he admitted having used cocaine in the past. Ostensibly for the purpose of impeaching the petitioner's credibility, the Government produced four Federal Firearms Transaction Records and had petitioner identify his signature on each of them. The Government had shown the forms to defense counsel prior to the examination of petitioner as to their content. The attorney for the Government, however, only indicated that he intended to cross-examine petitioner about his answer to a question on the said form in which petitioner denied being a "user" of narcotics at the time the form was executed. The Government indicated that the purpose of the interrogation was to impeach petitioner's credibility by showing a conflict between his trial testimony and the sworn answer on the said firearms form. At trial, petitioner's admission of prior use of cocaine related to a period of time prior to the execution of the firearms forms. In the said forms, petitioner answered negatively, under oath,

the question whether he was a "user" of narcotics. Petitioner attempted to explain the seeming conflict on the basis that he was not addicted to cocaine; that he was not a "user" of cocaine during the period of time when he executed the said forms; and, that his answers were truthful when they were made. The prosecutor's inquiry then suddenly turned from a debate with petitioner about the tenses of the words contained in the said forms and the appropriateness of petitioner's answers to a request that petitioner read the statement he had subscribed on the firearms form certifying the truth of his answers made on the four forms. The petitioner then read the following statement from one of the forms, in the presence of the jury:

> I hereby certify that the answers to the above are true and correct. I understand that a person who answers any of the above questions in the affirmative is prohibited by Federal law from purchasing and/or possessing a firearm. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

Upon hearing this statement read, defense counsel

asked permission to approach the bench. A discussion was had concerning the reading of this statement before the jury and the prejudicial effect it would have upon the jury as to both defendants. No further testimony was taken that day. Defense counsel, in the presence of the Court, asked that the Government furnish a copy of the four firearms transaction forms for use by counsel's research assistant in preparing appropriate memoranda to be presented to the Court the following morning. The Court even directed that such memoranda as counsel intended to file must be presented to the Court at least one-half hour before the time scheduled for proceedings to commence again. Copies of the firearms forms were made by Court personnel and furnished to defense counsel for the indicated use. The following morning, prior to any further testimony, defense counsel formally moved for a mistrial. He had timely presented his memorandum to the Court as ordered the previous day.

The Court denied petitioner's motion, stating that it did not believe the jury would *necessarily infer* that it was a federal firearms transaction

form. *See* "Appendix A," 513 F.2d at 277.

After the Court denied petitioner's motion for a mistrial, prefaced with the statement that defense counsel was continuing to object to the continuation of the trial before the jury which had heard the reading of the aforesaid prejudicial matter, defense counsel asked the Court to instruct the jury in limitation upon the use the jury could properly make of the information divulged to them by the reading to them by defendant of the certificate contained on the Federal Firearms Transaction Form. The Court did instruct the jury that the only legitimate use of that testimony could be the consideration for impeachment of the petitioner. No reference or undue emphasis was made by the Court in its instruction to remind the jury that the statement read to them on the day before related to the subject of firearms and narcotics.

In the memorandum submitted to the Court and served on the Government, it was stated that the Coroner of Orleans Parish, the place in which this trial occurred, had been publicly stating in the

news media, including the newspapers, radio and television, that the high murder rate in the City of New Orleans was attributable to the carrying of firearms by persons involved in the trafficking of drugs. Neither the Government nor the Court took issue with this statement. In light of the extensive circulation of the Coroner's statements at that time, no dispute would have lain against petitioner's statement regarding the widespread circulation of the Coroner's statement. Had either the Court or the Government done other than to acknowledge the truth of that statement, *sub silentio,* petitioner could easily have produced abundant evidence in support of it. By their acquiescence in the statement, defense counsel justifiably assumed the Court took judicial cognizance of the fact, the Government did not deny it, and the Court's ruling took that factor into consideration. This issue was carried forward on the appeal of this case. The Court below, while conceding that the Government's argument that the Government's tactic in having Marshall read the

certificate was neutral and intended to do no more than to show that he was not a credible person was unacceptable, and while agreeing that the said ploy was unnecessary to accomplish any legitimate purpose at all, and while declaring that this ploy did no credit to the prosecution, then stated, "Nevertheless, under the circumstances it clearly was not reversible error." Appendix A, 513 F.2d at 277.

Petitioner's theory of defense to the conspiracy charge was that the transactions between him and Dempsey and those between him and Howard *et al.* were mere sales transactions and that there could be no conspiracy between a buyer and seller since each was a necessary party to the distribution alleged in the indictment. Accordingly, petitioner asked the Court to charge the jury to that effect. The Court denied petitioner's written request for such a charge and refused to so charge the jury. Thus, the question was withheld from the jury with respect to the factual resolution of the terms of the dealing between the parties to determine whether these were mere sales transactions or a broader

based conspiracy, as alleged. The jury's only choices were guilty as charged, or not guilty, with no explanation that mere sales transactions, without more, do not constitute a conspiracy as between the buyer and seller.

Upon the instructions given by the Court, the jury deliberated and returned a verdict of guilty as to all counts against petitioner. The Court thereafter imposed three concurrent twelve-year sentences upon petitioner.

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, urging, among other things, that he was entitled to reversal and acquittal on the conspiracy charge for failure of the Court properly to apply Wharton's Rule to the transactions and to acquit the petitioner when the evidence showed only disconnected sales transactions which could not, under the Wharton Rule, be made the subject of a conspiracy charge. Petitioner further contended that he was entitled to reversal and a new trial, as to the conspiracy charge, because the Court improperly withheld the Wharton Rule defense

from the jury by refusing properly to instruct the jury, as requested. And petitioner urged the Court below to reverse the judgments as to all counts and to remand for a new trial thereon because of the unnecessary revelation to the jury, under the guise of impeaching the petitioner, that petitioner was involved in the purchase (explicit in the language, "with respect to *this transaction,*" after the statement that narcotic "user[s]" are "prohibited by Federal law from *purchasing * * * a firearm*) of at least four weapons at a time when he was alleged to have been trafficking in drugs and that recent public statements by the Coroner of Orleans Parish had attributed the high incidence of murders to the carrying of firearms by persons involved in the illegal traffic of narcotics. The Court of Appeals affirmed the conviction of petitioner in spite of these occurrences, from which judgment the petitioner now seeks relief herein.

REASONS FOR GRANTING THE WRIT

1. The decision of the Courts below, with respect to the Wharton Rule issues herein presented,

is in conflict with applicable opinions of this Court and with opinions of other Courts of Appeals.

The Wharton Rule was first stated by Francis Wharton, the legal scholar after whom it is now named. It was last stated by Wharton in 2 F. Wharton, *Criminal Law* § 1604, p. 1862 (12th ed. 1932), and it is presently stated in the Anderson revision, 1 Anderson, *Wharton's Criminal Law and Procedure* § 89, p. 191 (1957). Anderson's statement of the rule has been regarded by this Court, in *Iannelli v. United States*, 420 U.S. --- (Part 3), 95 S.Ct. 1284, 43 L.Ed. 2d 616 (March 25, 1975), to be the most simple formulation of the concept. Anderson states the rule as follows (1 Anderson, *op. cit., supra*, at 191):

> An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission. * * * (Footnotes omitted.)

Examples of situations to which the rule is applicable were collected, as follows (1 *id.*, at 191-192):

> * * * This rule applies to the giver and receiver of a bribe; to the giver and receiver of a rebate made illegal by the Federal Inter-State Commerce Act; to the parties to adultery; and to a fugitive from justice and the person concealing him. (Footnotes omitted.)

Situations to which the rule was stated to be inapplicable are: (1) those in which "the offense could be committed by one of the conspirators alone," 1 *id.*, at 192; (2) those in which "concerted action was not logically necessary, even though as a practical matter the offense could not be committed without co-operation," 1 *id.*, at 193; (3) those in which there is the addition of an unnecessary party, *i.e.*, "When those whose cooperation is necessary for the commission of the substantive crime conspire with another person to commit the offense, all are guilty of conspiracy," 1 *ibid.*; and (4) those in which "the law defining the substantive offense does not specify any punishment for one of the necessary participants," 1 *ibid.* The fourth exception to the Wharton Rule has been met with great opposition. Even Anderson states (1 *id.*, at 193-194):

> * * * Some courts reject the criterion of whether both parties are subject to specific punishment. Under this latter view, it has been held that a man and woman cannot be prosecuted for a conspiracy to commit adultery although only the one who was married may be punished for the substantive crime. By this latter view, a thief and the person receiving stolen goods should not be punishable for a conspiracy to receive stolen goods, and this

> conclusion should be reached without regard to whether the substantive crime is committed by the receiver alone. In most states the thief is not considered the accomplice of the receiver. (Footnotes omitted.)

Another means of determining the applicability of Wharton's Rule was noted in 1 Anderson, *op. cit., supra,* at 194:

> Another view has sometimes been suggested that the problem is one of statutory interpretation to determine whether the legislature meant the punishment for the substantive offense to be exclusive of any punishment for a conspiracy to commit that offense. By this view it is contended that when punishment is provided for all necessary participants in the substantive crime, a legislative intent is shown that no further punishment by way of conspiracy is intended. *A fortiori,* the same result should follow when by the substantive law one of the necessary parties is not punishable even for his intentional participation in the criminal act. (Footnotes omitted.)

This Court recently stated yet another view of when Wharton's Rule is applicable and when not (*Iannelli v. United States, supra,* 95 S.Ct. at 1293-1294, 43 L.Ed.2d at 627-628):

> Wharton's Rule applies only to offenses that *require* concerted criminal activity, a plurality of criminal agents. In such cases, a closer relationship exists between the conspiracy and the substantive offense because *both* require collective criminal activity. The substantive

> offense therefore presents some of the same threats that the law of conspiracy normally is thought to guard against, and it cannot automatically be assumed that the legislature intended the conspiracy and the substantive offense to remain as discrete crimes upon consummation of the latter. Thus, absent legislative intent to the contrary, the Rule supports a presumption that the two merge when the substantive offense is proven. (Emphasis in original.)
>
> * * * [A]s the Rule is essentially an aid to the determination of legislative intent, it must defer to a discernible legislative judgment. * * *

The above quoted language from the *Iannelli* case clearly indicates that this Court did not discard but reaffirmed that rule and elevated it to the status of a "presumption" that the substantive offense and conspiracy merge when the substantive offense is proven, absent legislative intent to the contrary.

The distribution of cocaine "*require*[s] concerted criminal activity, a plurality of criminal agents." *Ibid.* If there is no recipient, then the person who gives up possession becomes a depositor, not a distributor. To consummate the offense of distribution, the possession must pass from the distributor to the recipient.

No legislative intent to the contrary is discernible from the statutory scheme under 21 U. S.C. §§ 841(a)(1) and 846. Even those courts to which Anderson referred, 1 Anderson, *op. cit., supra,* at 193, which would hold the Rule inapplicable in situations wherein one of the actors was exempted from punishment, would permit its application when the necessary participants would all be punishable under the substantive statute. The transferee or distributee or recipient, however he is characterized, once in possession, has committed either the crime of possession of narcotics or possession of narcotics with the intent to distribute them. It is pointed out, however, that this Court is one of the Courts which rejects the conspiracy theory when one of the parties is not subject to punishment under the substantive statute. *Gebardi v. United States,* 287 U.S. 112 (1932). But the intent to reach every form of illegal dealing with narcotics in the substantive statute, all of which would involve passing possession with the sole exception of manufactur-

ing, is clear evidence that Congress did not intend that ordinary distributional activities, involving only the distributor and recipient, should be made the subject of a conspiracy prosecution.

An agreement is implicit in any such distribution, whether it merely be the agreement to receive or accept the unlawful possession of the narcotics without consideration or whether it be a sales type agreement where the parties agree to exchange narcotics for something of value. In distributional type activities, there is a necessary "plurality of criminal agents." *Iannelli v. United States, supra,* 95 S.Ct. at 1293, 43 L.Ed.2d at 627.

It is suggested that this Court's opinion in the *Iannelli* case did not change the situations in which the Wharton Rule would be applicable; it only explained one situation in which it would not and gave guidance to the lower courts for determining in what other situations the Rule would not be applicable. There is substantial precedent, either of this Court or cited with approval by this Court, which would affirm that a buyer-seller transaction,

without more, would not be prosecutable as a conspiracy.

In a case under the National Prohibition Act, this Court recognized that where there was only one buyer and one seller of contraband whiskey, and as the agreement of the parties was *an essential element in the sale,* an indictment of the buyer and seller for a conspiracy to make the sale would be of doubtful validity. *United States v. Katz,* 271 U.S. 354, 355-356 (1926), citing *United States v. N.Y.Cent. & H.R.R.,* 146 Fed. 298 (S.D.N.Y., 1906); *United States v. Dietrich,* 126 Fed. 664 (D.Neb., 1904); *Vannata v. United States,* 289 Fed. 424, 427 (2 Cir. 1923). The Court said, "This embarrassment could be avoided in an indictment for a criminal conspiracy *only if the buyer and seller were charged with conspiracy to commit a substantive offense having an ingredient in addition to the sale,* not requiring the agreement of two persons for its completion." *United States v. Katz, supra,* at 355-356, citing *Chadwick v. United States,* 72 C.C.A. 343, 141 Fed. 225 (6 Cir. 1905)(emphasis added).

While this Court did not state that the principles it applied were the Wharton Rule, the jurisprudence cited by this Court did so. *United States v. N.Y. Cent. & H.R.R. Co., supra,* at 303; *United States v. Dietrich, supra,* at 667; *Vannata v. United States, supra,* at 427; *Chadwick v. United States, supra,* 141 Fed. at 236.

In the *New York Central* case, *supra,* several individuals were indicted, two for taking rebates and two for giving rebates in violation of the Interstate Commerce Act. But rather than being charged in substantive counts, the grand jury (at the prosecution's behest, of course) indicted the individuals for conspiracy. The Elkins Act, which had modified the penal provisions of the Interstate Commerce Act so that no term of imprisonment could be imposed for giving or receiving rebates in violation of the Interstate Commerce Act, was sought to be avoided by resort to the general conspiracy statute. There is a similarity between giving and receiving rebates made illegal by Federal law and the selling and buying of narcotic drugs, made ille-

gal by Federal law. But even assuming their difference, the following reasoning of the Court in the *New York Central* case seems applicable, *mutatis mutandis*, to a case of narcotics distribution (146 Fed. at 303):

> * * * when the concurrent action of two persons is necessary to perpetrate a certain crime, and all that they do is to agree to do it and to do it, it seems difficult to claim that their agreement to act is in law a conspiracy, and their act a distinct crime, and that the agreement to act can be punished more severely or differently from the act itself. I think that the offense of giving or receiving rebates is such an act. It requires the concurrence of two persons. A rebate cannot be given unless there is some one who agrees to receive it and who does receive it, and cannot be received unless there is some one who agrees to give it and who does give it. * * *

In the *Dietrich* case, the Court there also graphically demonstrated the fault in the reasoning of the lower courts in this case. There, the Court said (126 Fed. at 666-667):

> As the transaction is stated in the indictment, it was Dietrich who agreed to accept the bribe, not Dietrich and Fisher, and it was Fisher who agreed to give the bribe, not Fisher and Dietrich. The charge is not that two or more persons agreed among themselves to corruptly obtain the aid of another, a member of Congress, in securing the appointment of some aspirant to a federal office, nor is it

> that two or more members of Congress agreed among themselves to obtain from another person a reward of compensation for their services, or aid in securing such an appointment. * * * The agreement or transaction stated in the indictment was immediately and only between two persons, one charged with the intended taking, and the other with the intended giving, of the same bribe. Concert and plurality of agents in such an agreement or transaction are, in a sense, indispensable elements of the substantive offenses * * *. A person cannot agree with himself, receive from himself, or give to himself. The concurrent and several acts of two persons are necessary to the act of acquiring, receiving or giving * * *.

Similarly, this Court, in *Gebardi v. United States,* 287 U.S. 112 (1932), disallowed the conviction for conspiracy of a woman who acquiesced in being carried across State lines for immoral purposes. Although this rationale was not stated in the opinion, the result is consistent with the *Katz* opinions and the opinions of the lower federal courts cited therein that where the concurrent activities of two persons are necessary for the consummation of the offense, the joint activity of both constitutes, if any offense, only the substantive offense. Because the statute defining the substantive offense treated the woman as a victim and exempted her from prosecution, this Court, in *Gebardi,* prevented the

Government from indirectly procuring the woman's punishment through the device of calling her conduct a conspiracy. This was a clear application of that portion of Wharton's Rule which reads as follows:

> when the law says "a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name," it is not lawful for the prosecution to call it by some other name; and when the law says such an offense—*e.g.*, adultery—"shall have a certain punishment," it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy."

2 Wharton, *Criminal Law* § 1339 (10th ed.), quoted from *United States v. Dietrich, supra,* at 667.

In *Direct Sales Co. v. United States,* 319 U.S. 703 (1943), the pharmaceutical house (Direct Sales) defended in this Court on a Wharton Rule concept, which defense was found to be inapplicable. Urging that *United States v. Falcone,* 311 U.S. 205 (1940), which held that "one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party," 311 U.S. at 210-211, the company contended that it could not be successfully prose-

cuted for selling legal narcotics to a physician authorized to purchase, prescribe and dispense them. This Court rejected that argument, not in principle but in its application to the facts of that case. The company had engaged in high pressure sales promotions, it sold to the doctor for about seven yeras in quantities which made it apparent that the doctor was using them illegally. The company had even been warned on several occasions that it was treading dangerously close to violating the law, if it had not done so. This Court distinguished the facts in the *Direct Sales Co.* and *Falcone* cases, noting that it was reasonable for the jury to believe that the Direct Sales Company had joined in the doctor's criminal venture, adopted it, stimulated it and shared in its profits. In discussing the applicable law, however, this Court said (319 U. S. at 712):

> * * * Concededly, not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy.[8]

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8. This may be true, for instance, of single

> or casual transactions, not amounting to a course of business, regular, sustained and prolonged, and involving nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase, for whatever end. A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy. There may be also a fairly broad latitude of immunity for a more continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge, but without stimulation or active incitement to purchase.

In *United States v. Zeuli,* 137 F.2d 845 (2 Cir. 1943), Judge Learned Hand, writing for the Court, stated that, although this Court had never actually decided the question whether Wharton's Rule was valid doctrine, this Court had twice applied its principles in the *Katz* and *Gerbardi* cases, both *supra*. In the *Zeuli* case, the same situation was presented that exists here. The indictment properly charged a conspiracy because, the indictment alleged, the original theft was contemplated in the scheme and not the mere casual sale of stolen merchandise to a fence after it had been stolen. The proof, however, revealed the latter circumstance. Following the Wharton Rule, the Court acted to strike down the conviction because, as it was proved on the trial,

the facts did not constitute a situation in which a conspiracy charge could be made, hence such a conviction could not be maintained. For reasons advanced hereinbelow, the conspiracy charge in this case could not be made on the true facts, hence it cannot be maintained.

In *Davis v. United States,* 279 F.2d 576 (4 Cir. 1960), the Court distinguished the above quoted statement from the *Direct Sales Co.* case and applied the rationale of the Wharton Rule to affirm the conviction. There, the appellant had let drugs to a pusher *on consignment,* getting $1.50 per capsule after the pusher had sole each capsule for $2.50, and getting nothing until the capsules were sold. The pusher was clearly the supplier's agent in those circumstances, not an independent dealer who purchased from the supplier and conducted his own pushing operation. Since the sales by the pusher did not necessarily involve the supplier, and since the supplier maintained an interest in the pusher's activities, the Court found there to be a continuing understanding and arrangement which amounted to a

conspiracy to distribute the supplier's drugs to the ultimate users, and not merely casual, indiscriminate sales of contraband to a person who was free to dispose of the drugs as he saw fit. This result was consistent with that reached by the Second Circuit in *United States v. Koch,* 113 F.2d 982 (2 Cir. 1940).

In *United States v. Brown,* 495 F.2d 593 (1 Cir. 1974), the Court recognized that a buyer-seller relationship might, in an appropriate case, preclude a finding of conspiracy. 495 F.2d at 596, citing *United States v. Braico,* 422 F.2d 543, 544 (7 Cir.), *cert. den.,* 398 U.S. 912 (1970); *United States v. Ford,* 324 F.2d 950, 952 (7 Cir. 1963). But after analyzing the evidence, the Court found it to be "particularly supportive of defendant's role as a co-conspirator, and not a mere prospective purchaser." 495 F.2d at 597.

In *United States v. Braico, supra,* at 544, as it had decided in *United States v. Varelli,* 407 F.2d 735, 748 (7 Cir. 1969), the Seventh Circuit recognized that "The relation of buyer and seller even with knowledge of the character of the goods being

sold is insufficient to make the buyer a conspirator." Significantly, both the *Braico* and *Varelli* cases involved more than two parties, but, in each instance, there was only one person on the buyer's side of the transaction. The multiplicity of *sellers,* who were also the thieves, did not bring the indictment under the third-party [*concursus facultativas, see* 2 F. Wharton, *Criminal Law* § 1604 (13th ed. 1932)] exception to the Wharton Rule since the alleged conspiracy was to *receive* stolen goods. *See,* also, *People v. Wettengel,* 98 Colo. 193, 58 P.2d 279 (1935); *People v. Purcell,* 304 Ill.App. 215, 26 N.E.2d 153 (1940). There was but one recipient of the stolen goods, who was in the relationship of *concursus necessarius,* not that of *concursus facultativas* as discussed in 2 Wharton, *op. cit., supra,* § 1604.

In the instant case, there is only the single buyer, Dempsey, and the single seller, Marshall, in the transactions involving those two; and, as between Howard and Marshall, no reasonable minded jury could have concluded beyond a reasonable doubt that Howard was anything but an independent purchaser of cocaine

from Marshall on his first trip to New Orleans and the *purchasers'* agent, not Marshall's (the distributor's) agent, with respect to the second visit out of which that leg of the alleged conspiracy, as well as the two substantive offenses, arose. This was an indictment charging a *conspiracy to distribute,* and, Howard being an agent for the intended recipient, he could not have been in a conspiracy with Marshall as the Wharton Rule is applicable to preclude prosecution or punishment for conspiracy in those circumstances. That Howard was the purchasers' agent, and not Marshall's, seems best demonstrated by the single evidence in the case that, when the purchase was completed, the undercover agent paid Howard $200.00 for setting up the sale. Is it reasonable that the Federal Agent would have paid Marshall's agent for setting up a sale to the agent? Manifestly not! The only reasonable explanation for the agent paying Howard was that Howard was working or acting for him in the course of the negotiations and delivery of the cocaine. Other evidence corroborates, however, that Howard was the agent for the purchasers. The

testimony is clear that the Federal Agent and Freddie Smith solicited Howard, while he was in Chicago, to set up the purchase of cocaine from his New Orleans connection after Howard revealed that he had a source of higher grade cocaine in New Orleans.

The Fifth Circuit has twice considered the applicability of Wharton's Rule prior to thise case —once in a case involving 18 U.S.C. § 1955, *United States v. Pacheco,* 489 F.2d 554 (5 Cir. 1974), and once in a narcotic case, *United States v. Apollo,* 476 F.2d 156 (5 Cir. 1973). Even the Fifth Circuit, which denied the application of the Wharton Rule in the present contraband distribution conspiracy case, recognized that this Court's opinion in *United States v. Katz, supra,* stood for the proposition that Wharton's Rule applied to "the buying and selling of contraband goods." *Pacheco, supra,* 489 F.2d at 558. Because the "five or more persons" limitation upon Federal jurisdiction under 18 U.S.C. § 1955 was regarded as a purely jurisdictional criterion and that "Such jurisdictional requirements are unrelated to the criminal character of the conduct and should be separately treated," *id.* at 558, the Court declined to apply

Wharton's Rule to § 1955 offenses.

The *Apollo* case, pruned of all inadmissible evidence, turned upon an analysis of certain statements made by and to Apollo in the course of his dealings with Cocroft, a wholesale dealer who was unquestionably a member of a large conspiracy. The prosecution was for conspiracy to *smuggle* marijuana into the United States, not for conspiring to *sell* marijuana. 476 F.2d at 160. The Wharton Rule defense, however, was interposed on the basis that Apollo was a simple purchaser from Cocroft and, since his acts of purchasing marijuana from Cocroft did not make him a conspirator with Cocroft under the Wharton Rule, then Apollo was not liable for the *smuggling* activities of his alleged co-conspirators. In other words, since the purchasing of marijuana from a seller of marijuana who happened to be a member of a larger conspiracy to smuggle and sell marijuana did not constitute the formation of a conspiratorial relationship between the buyer and seller, then Apollo joined no conspiracy and adopted no prior or subsequent acts under-

taken by the persons with whom he did business. If Apollo had been able to demonstrate that he was only a purchaser, his view of the case would have prevailed.

Recognizing the Government's case against Apollo was "skimpy," 476 F.2d at 162, the Court found there to have been sufficient evidence to have authorized presentation of the case to the jury, and its verdict. The following excerpt from the Fifth Circuit's opinion in *Apollo* puts that case on a parity with *Davis v. United States, supra,* which turned on the fact that the purchaser took the contraband product on consignment (476 F.2d at 160-161):

> * * * Johnson testified that upon leaving the bedroom Apollo was carrying a closed, plastic sack containing what Johnson believed to be compressed bricks of marijuana. At that moment and in Johnson's presence, the following exchange occurred:
>
> COCROFT: "Can you handle it?"
>
> APOLLO: "Oh yes, I can handle it. I'm going to run it up to Madison."
>
> COCROFT: "I need the money as soon as possible because I want to recop [*i.e.*, repurchase] so that we can get orders and things going."
>
> APOLLO: "Well, I'll get the money as soon as possible. Is it good stuff?"

COCROFT: "It is Mexican. I only have the best."

Apollo did not know the quality of the marijuana he was getting. He did not have to pay for the marijuana until he could get the money. And he was knowingly selling the marijuana to further the interests of the conspirator, Cocroft, as well as his own. He was told that the prospective use of Apollo's proceeds from the sale of marijuana was to resupply the supplier. And he knew the supplier obtained his marijuana, either directly or indirectly, from Mexico.

Another colloquy between Apollo and Cocroft was quoted by the Court, the purport of which was that Cocroft told Apollo, "It looks like we're just moving." And when Apollo said he was going to Madison, where Apollo had previously said he was taking the marijuana (ostensibly for the purpose of selling it), Cocroft said, "Good. I've got some stuff coming right away and they want cash for it." 476 F.2d at 161. Here, again, Cocroft included Apollo in his venture, indicating to Apollo that he was a needed source of money for the repurchase of marijuana.

The Fifth Circuit Court of Appeals summarized the evidence on which it found the jury could have reasonably decided Apollo's guilt (476 F.2d at 162):

> * * * In the present case, there was direct proof of a continuing relationship between Apollo and Cocroft, a known conspirator, which resulted on at least two occasions in the witting transfer of Company marijuana to Apollo. Furthermore, the conversations between Apollo and Cocroft in the presence of third persons demonstrate that Apollo was aware of Cocroft's involvement with one or more other parties in a large-scale operation to illicitly import and distribute marijuana. Whether Apollo was intended to be within Cocroft's "we" when Cocroft stated he needed the proceeds from Apollo's resales so "*we* can get orders and get things going" or when he told Apollo, "It looks like *we*'re just moving," these statements indicated that Apollo was fully aware that he was the product outlet and the source of cash inflow that enabled the unlawful plan to operate. * * * (Emphasis in original.)

The evidence in the case *sub judice* will not support any theory of consignment sales. It will not support anything other than some repeated transactions between Marshall and Dempsey and between Marshall and Howard *et al.*

The multiplicity of *purchasers* does not operate to render the Wharton Rule inapplicable in this prosecution for conspiracy to *distribute* narcotics.

The law is clear that joint recipients are not in a conspiracy with the necessary party on the other side of the transaction. *Accord: United States v. N.Y.C. & H.R.R. Co., supra* (two givers and two recipients of rebates, applying syllogistic reasoning of bribery cases); *United States v. Braico, supra,* and *United States v. Varelli, supra* (multiple thieves selling stolen goods to fence, charged with conspiracy to receive stolen goods); *People v. Wettengel, supra* (bribery, with several prospective givers but only one receiver); *People v. Purcell, supra* (conspiracy to gamble with cards, several persons in the card game).

It was unreasonable, under the facts adduced on the trial of this cause, for the jury to have concluded beyond a reasonable doubt that petitioner conspired either with Dempsey or Howard *et al.*, or both. *Cf. Blumenthal v. United States,* 332 U.S. 539 (1947), *reh. den.,* 332 U.S. 856 (1948). At the very least, *Blumenthal* requires that one or the other of the alleged conspiratorial spokes be proved to have existed by evidence of some conduct on Marshall's

part more extensive than his merely making a few casual, distinct narcotic transactions with his alleged co-conspirators.

In the circumstances of this case, the mandatory provisions of Rule 29(a), F.R.Cr.P., required the Trial Court to order petitioner's acquittal on the conspiracy charge.

Considering the possibility that this Court should disagree that there was insufficient evidence to support the conviction for conspiracy by virtue of the Wharton Rule's applicability to the facts developed on trial, there remains the fact that this theory of the defense was never submitted to the jury on proper instructions. Petitioner requested the Court to charge the jury it could find no conspiracy if it only found a buyer-seller relationship existing between Marshall and Dempsey or between Marshall and Howard *et al.* The language upon which the preceding statement is interpolated is set forth in petitioner's statement of Issues Presented.

It is impermissible for the Trial Court to

have deprived petitioner the opportunity to have any theory of defense considered by the jury if there is any evidence, or if there is a lack of evidence, which would support that theory of defense. In *Perez v. United States*, 297 F.2d 12, 15-16 (1961), the Fifth Circuit said:

> It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence. *Tatum v. United States*, 190 F.2d 612 (D.C.Cir. 1951). A charge is erroneous which ignores a claimed defense with such a foundation. *Hyde v. United States*, 15 F.2d 816 (4 Cir. 1926). The charge to which he is entitled, upon proper request, in such circumstances is one which precisely and specifically, rather than merely generally or abstractly, points to his theory of defense * * *, and one which does not unduly emphasize the theory of the prosecution, thereby de-emphasizing proportionally the defendant's theory. * * *

Certainly, a theory of defense based upon a lack of evidence as to a material fact, *i.e.*, the existence of some relationship between the parties to this conspiracy indictment beyond the mere buyer-seller relationship, is a theory of defense for which there is a foundation in the evidence. The charge here totally ignored the defensive theory that Marshall

was a casual seller, indifferent to the further illegal conduct of the buyer. By omitting to charge the jury on this viable Wharton Rule defense, the Court took from the defendant the right to have the jury, and not the Court, determine if there was a factual basis for determining the competing (had the charge been given) theories of the prosecution and defense. Certainly, in the circumstance of absolute denial of the defensive charge, the prosecution's theory was emphasized and defendant's theory was negated. The jury was left only with the determination whether petitioner was guilty as charged or not guilty. An explanation in the jury charges of the Wharton Rule's application would not only have probably resulted in acquittal of the conspiracy charge but would have made the performance of the duty to acquit more palatable to the jurors.

The Court below should have reversed the convictions herein, with respect to the conspiracy charge, because the Court refused properly to charge the jury and permit it to decide the actual

relationship between Marshall and his alleged co-conspirators.

Because the Court of Appeals has failed properly to apply applicable precedent of this Court and other Courts of Appeals, and because by affirming this conviction when a proper theory of defense instruction was presented to but rejected by the Court at trial, the Court below has sanctioned a radical departure from the orderly administration of justice in the Courts of the United States. This Court should therefore grant this petition for a writ of certiorari to review the judgment of the Court below and, after hearing is had, this Court should reverse the conspiracy conviction and remand this cause for the proper action by the District Court, depending on whether the Court's judgment is that the Trial Court erroneously denied petitioner's motion for a judgment of acquittal or whether it simply failed properly to submit the Wharton Rule defense to the jury on proper instructions.

2. By sanctioning the prosecutor's tactic, calculated to prejudice the petitioner before the jury

by portraying him as a gun-wielding drug dealer, when such portrait was unncessary for purposes of impeaching the petitioner, or for any other legitimate purpose for that matter, and by sanctioning the denial by the Trial Court of petitioner's motion for a mistrial, the Court below has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Under the guise of impeaching the defendant, the attorney for the United States tendered four Federal Firearms Transactions Record forms to the petitioner, asked him to identify his signature on the forms, and then questioned the petitioner about an answer on the form which stated that petitioner was not a "user" of narcotics. After a substantial amount of colloquy between petitioner and the attorney for the Government concerning the tense of the question answered by petitioner on the forms, the Government attorney asked petitioner to read the certificate subscribed by him on one of the Federal Firearms Transaction Records. Petitioner responded,

reading the following to the jury:

> I hereby certify that the answers to the above are true and correct. I understand that a person who answers any of the *above questions* in the affirmative is *prohibited* by Federal law *from purchasing* and/or possessing *a firearm*. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to *this transaction* is a crime punishable as a felony.

When the said Record was tendered to defense counsel for inspection prior to the cross-examination of the defendant, it was indicated to defense counsel that the Government attorney intended to impeach defendant on the basis of a statement made in the said Record, under oath, that he was not a "user" of narcotics. Nothing was said regarding the said attorney's intent to have the defendant read the above-quoted certificate to the jury. The Government attorney did not have extra copies of the said Record for defense counsel to use in following the cross-examination of the defendant. The content of the certificate, when it was read by the defendant to the jury, came as a total surprise to defense counsel.

The Court below summarized the proceedings relative to this occurrence, as follows (Appendix A, 513 F.2d at 277):

> Marshall did not object at the time to reading the certificate, which occurred at the end of a trial day. But, before court began the following morning, the trial judge instructed the government to make no further reference to the documents. He noted that the jury had not seen it and *expressed his view that the jury would not necessarily infer that it was a federal firearm transaction form.* When court convened he gave an instruction to the jury limiting the testimony relating to the form and the certificate to the issue of Marshall's credibility.

Omitted from the following account of the proceedings are several significant facts. Defense counsel requested permission to approach the bench immediately after the defendant read the certificate to the jury and an off-the-record conference was had concerning these occurrences. Defense counsel's objection, though instantaneous upon the reading of the certificate, was not made prior to such reading because the Government did not provide counsel with a copy of the form with which to follow the cross-examination. The Trial Court was well aware, on the evening before Court recessed,

that defense counsel would move for a mistrial. Defense counsel obtained copies of the Federal Firearms Transaction Records for use in preparing a memorandum to be submitted the following morning prior to the commencement of proceedings. The Trial Court indicated to defense counsel that such a memorandum must be filed at least one-half hour prior to the commencement of the trial the following morning. When the Trial Court was presented with the memorandum on the following morning, it was no surprise.

In relationship to the proceedings, the mistrial motion was the next occurrence in Open Court before the jury following the bench colloquy. If there are circumstances when a motion for mistrial presented the following morning would be untimely even though no further proceedings had been had in Court before the jury, those circumstances surely would not exist when the Court and prosecutor were made aware that the motion would be presented and the Court directed that a memorandum be filed, if at all, a half hour before the scheduled Court

Session the following day.

As to the Trial Court's observation, recited by the Court below, that the jury would not *necessarily infer* that it was a federal firearms transaction form from which the defendant was compelled to read to the jury, the question occurs whether the appropriate inquiry should not have been whether the reading of the statement relative to firearms was so likely to prejudice the defendant before the jury that it could not be cured by instructions. Both the District Court and the Court of Appeals concedes that the prosecutor's tactic was wrong. In order for the Trial Court's observation to be acceptable, it would seem to be necessary to impute to the jury an inattentativeness which the Courts have been reluctant to do when matters concerning an accused's guilt or innocence have been obliquely presented to them. In circumstances where the relevance of facts supportive of the determination of guilt would require the use of thought processes characteristic of appellate judges, the Courts have traditionally regarded the jurors to be sufficiently alert to have heard and

comprehended this critical evidence upon which the sustenance of the jury's verdict depended. Why, then, is there such a double standard when extremely prejudicial material is introduced to the jury by a shrewd prosecutor who, losing the debate on the tense of the sentence, got the idea to prejudice the defendant by asking him to read the certificate which revealed to the jury the fact that petitioner was in somehow or another associated with firearms.

The jury would not have had to resort to such abstract thinking to reach the conclusion that the records involved firearms and narcotics as that to which reference is above made. The certificate plainly said that persons who answer the "above questions" in the affirmative are "prohibited" from "purchasing * * * a firearm." And if that would not have made the association complete for the jury, the final sentence, referring to "this transaction," would have made it unequivocally clear to the jury that the form related to firearms. Coupling the prosecutor's questioning relative to whether the petitioner was a "user" of narcotics at the time he

made the answers with the fact that the answers were made to determine the legality of a firearms purchase, "this transaction," could have led to no conclusion by the jury but that petitioner was an armed narcotics user. Given this critical information, it would have been an easy step for the jurors to vote guilty as to all counts in the indictment. Would not the average juror feel it to be the more prudent course where armed drug users are concerned to take no chances and to convict the accused? If the one further critical piece of information, that the Coroner was contemporaneously making statements to the news media which were widely circulated throughout the entire Eastern District of Louisiana that the high incidence of murder in the Parish of Orleans was attributable to armed drug traffickers, the conclusion seems inescapable that petitioner was severely prejudiced before the jury and that the prejudice suffered by him in the eyes of the jury was incapable of eradication by the Court giving a precautionary instruction. Mr. Justice Jackson's

words, applicable in such circumstances as this, need not be quoted to this Honorable Court.

The Government suggested in argument that having petitioner read the certificate to the jury was neutral and intended to do no more than show that he was not a credible person. The Court below acknowledged that it would have to be "naive" to accept that argument. Appendix A, 513 F.2d at 277. From the wording of the opinion, it is apparent that the Court's comment was directed not only to the fact that the reading of the certificate was not neutral but that it was intentionally done for purposes other than showing the petitioner was not a credible person. And, in spite of its recitation of the Trial Court's observation that the jury would not necessarily infer the nature of the records, it is obvious that the Court of Appeals recognized that the jury was smart enough to know. Otherwise, why did the Court, in opining that the means undertaken by the attorney for the Government were unnecessary, state that the Government could have conducted the examination in such a way "so that the document was

not identified as relating to firearms * * *." Appendix A, 513 F.2d at 277.

All of the elements for reversal of the convictions on all counts seem to be present in this case. There was prejudice of such a nature that it would have been incurable by instruction to the jury. The prejudicial error occurred by virtue of the Government's conduct, which the Court below recognized, inferentially, to be unnecessary and deliberate.

Rule 26, F.R.Cr.P., permits only relevant and competent evidence to be presented to the jury. It must be material and its prejudicial nature may not outweigh its probative value to the case. All of these principles are recognized principles of the common law of England and of the United States, dictated by reason, common sense and a sense of justice. The evidence of which instant objection and complaint is made did not meet any of the criteria for admissibility. It met all the criteria for suppression or exclusion.

By the failure of the Court below to reverse the convictions obtained in the face of such preju-

dicial revelations to the jury, we respectfully submit that the Court of Appeals has so far sanctioned a departure from the acceptable and usual course of judicial proceedings under Rule 26, F.R. Cr.P., that this Court should grant this petition and, after hearing is had herein, it should reverse the convictions of defendant on all counts and remand this cause for a new trial.

CONCLUSION

For the foregoing reasons, this Honorable Court should grant this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit and, after hearing is had herein, the judgment below should be vacated and this Court should order entry of the appropriate relief to which it deems petitioner entitled.

Respectfully submitted,

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CERTIFICATE

I certify that I have served a copy of the foregoing Petition for a Writ of Certiorari upon the Solicitor General of the United States by mailing a copy of same to him, first class airmail, postage prepaid, addressed to the Office of the Solicitor General of the United States, Department of Justice, Washington, D. C., this 6th day of September, 1975.

BERNARD A. HORTON
Attorney at Law

UNITED STATES of America, Plaintiff-Appellee,

v.

Henry Forrest MARSHALL and Robert Dempsey, III, Defendants-Appellants.

No. 74-2203.

United States Court of Appeals, Fifth Circuit.

May 27, 1975.

Defendants were convicted before the United States District Court for the Eastern District of Louisiana, R. Blake West, J., of conspiracy to possess cocaine with intent to distribute and to cause distribution, one defendant was also convicted of two counts of distribution of cocaine and appeal was taken. The Court of Appeals, Godbold, Circuit Judge, held that first defendant's prior conviction of possession of cocaine did not preclude his subsequent prosecution for conspiracy involving same overt acts upon which prior conviction was based; that second defendant was not entitled to severance prior to trial on ground that introduction of first defendant's earlier pleas of guilty to substantive cocaine transactions would automatically establish conspiracy count against him; that Government's requiring second defendant on cross-examination to read certificate that he made when he signed federal firearms transaction form, after defendant had acknowledged that he had answered question on form as to whether he was a user of drugs in the negative, did not constitute reversible error; and that phrase "a drug addict is inherently a perjurer" in defendant's requested instruction on credibility of addict informer justified refusal to give the requested instruction.

Affirmed.

1. Criminal Law ⇐618

Single trial of a person with respect to all issues arising out of a single transaction or occurrence may be desirable but is not constitutionally required.

2. Criminal Law ⇐200(6)

Defendant's prior conviction of possession of cocaine did not preclude his subsequent prosecution for conspiracy involving same overt acts upon which the prior conviction was based.

3. Criminal Law ⇐622(2)

In prosecution for conspiracy to possess cocaine, defendant was not entitled to pretrial severance on ground that he would be prejudiced in joint trial with codefendant because introduction of codefendant's earlier plea of guilty to counts charging him with three cocaine transactions would automatically establish conspiracy count against defendant, where it was not clear at time pretrial motion for severance was filed that recital of codefendant's prior conviction would be offered in evidence and the prior conviction did not mention defendant as an actor with respect to the overt acts in question.

4. Criminal Law ⇐1177

Even if trial of defendant, who was charged with conspiracy to possess cocaine with intent to distribute and distribution of cocaine, should have been severed from trial of codefendant, who was charged only with conspiracy, defendant's conviction of conspiracy did not "fatally infect" substantive counts charging him with distribution of cocaine and did not preclude affirmance of defendant's conviction of distribution of co-

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INDEXED

caine under concurrent sentence doctrine.

5. Criminal Law ⇐1170½(5)

In prosecution for conspiracy to possess cocaine with intent to distribute and distribution of cocaine, requiring defendant on cross-examination to read certificate that he had made when he signed federal firearms transaction form, after defendant had previously acknowledged that, in executing the document, he had answered question as to whether he was user of drugs in the negative, did not constitute reversible error, despite contention that evidence pertaining to the form implied that defendant was guilty of a firearms felony.

6. Criminal Law ⇐1173.2(5)

Refusal of defendant's request for an instruction on credibility of an addict informer did not constitute reversible error where testimony of at least two of three addict informers was substantially corroborated.

7. Criminal Law ⇐785(4)

Phrase "a drug addict is inherently a perjurer" in defendant's requested instruction on credibility of an addict informer justified refusal of the requested charge.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before AINSWORTH, GODBOLD and SIMPSON, Circuit Judges.

GODBOLD, Circuit Judge:

Count I of the indictment in this case charged appellants Dempsey and Marshall and defendant Howard, who pleaded guilty and did not appeal, with conspiracy to possess cocaine with intent to distribute and to cause distribution. Count II charged Marshall with distribution of cocaine with Howard as an aider and abettor, and Count III charged Marshall and Howard with distribution of another quantity of cocaine. Dempsey was not charged in Count II or III.

The convictions of both Dempsey and Marshall are affirmed.

Count I, the conspiracy count, alleged 27 overt acts of which seven involved Dempsey. Three of these seven were the same acts that had been charged in three substantive counts of an earlier indictment against Dempsey, to which Dempsey had pleaded guilty and the sentence under which he had begun to serve. Dempsey timely asserted in the District Court the claim that he was entitled to dismissal of the instant indictment against him, alleging as grounds collateral estoppel and double jeopardy. Also he alleged that he would not have pleaded guilty in the earlier case against him if he had known or anticipated that the government would follow up with a conspiracy indictment, and that he could not effectively defend himself against the conspiracy charge because the earlier plea made conviction of conspiracy automatic.

[1, 2] Dempsey relies upon the concurring opinion of Justices Brennan, Douglas and Marshall in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), to the effect that the double jeopardy clause requires the government to join in one trial all charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction. *Id.* at 453–454, 90 S.Ct. 1189, 25 L.Ed.2d at 481. In *Ashe* the petitioner had been charged with armed robbery of one of several players in a poker game and found not guilty, and subsequently was charged, tried and convicted of robbery of anoth-

er of the players. The only rationally conceivable issue in dispute before the jury in the first trial was whether the petitioner had been one of the robbers, and the jury by its verdict had found that he was not. The same issue was before the second jury, with only the identity of the victim changed. In the instant situation Dempsey does not claim the benefit, under the principle of double jeopardy with the *Ashe* gloss, of a prior acquittal. He was convicted in his first trial rather than acquitted. Pared to its real content, his argument is that as a policy matter there should be a single trial of a person with respect to all issues arising out of a single transaction, occurrence etc. That may be a desirable prosecutorial aim for an overburdened court system faced with a growing volume of cases, but it is not a constitutional imperative.[1] Additionally, the two offenses charged to Dempsey in the present and the previous cases are separate charges requiring distinct elements of proof. We have repeatedly held, and lately reiterated, United States v. Pacheco, 489 F.2d 554, 557 (CA5, 1974), that the commission of a substantive offense and a conspiracy to commit that offense are separate and distinct and that ordinarily a person may be convicted of and sentenced for both. Distribution of narcotics is not necessarily a two-person crime as contemplated by the limited scope of "Wharton's Rule." *Id.* at 558. While distribution may connote a buyer and seller it also, and indeed often does, connote plurality of sellers or buyers or both.

Dempsey's claim that he was entitled to a judgment of acquittal for insufficiency of evidence is without merit.

Before trial Marshall claimed that he was entitled to a severance, asserting that unavoidably he would be prejudiced in a joint trial with Dempsey because introduction of Dempsey's earlier plea to the three cocaine transactions would automatically establish Count I, the conspiracy count, against him (Marshall). The motion was denied. At trial Marshall reasserted his motion for severance after Dempsey introduced the judgment of his own previous conviction.

[3, 4] Denial of the pre-trial motion for severance was not reversible error. It was not clear at that point that the recital of Dempsey's prior conviction would be offered in evidence. The three overt acts did not mention Dempsey as an actor, and Marshall's contention that evidence that these three acts in fact occurred would inevitably establish his guilt of conspiracy is overblown. With respect to the denial of the motion when reasserted at trial, we pretermit discussion since Marshall was convicted under all counts and given concurrent sentences.[2] Conviction on the conspiracy count did not "fatally infect" the substantive counts so as to preclude application of the concurrent sentence doctrine. See United States v. Tyler, 505 F.2d 1329 (CA5, 1975).

In cross-examination Marshall admitted that he had been a user of narcotics. The government, in the guise of attacking his credibility, displayed to him a federal firearms transaction form signed

1. It is worth noting that at trial the government did not introduce the record of Dempsey's prior guilty plea and conviction. Dempsey introduced it in support of his effort to convince the jury that he had been punished once and that once was enough.

2. We note, however, that Marshall did not object to introduction of the judgment of Dempsey's conviction but rather asked for a limiting instruction, which the court gave, and only then did he review his motion for severance.

by him. It was neither verbally identified nor displayed to the jury. Counsel had Marshall read aloud from the form a question asking whether he was a user of drugs. Marshall acknowledged that in executing the document he had answered the question in the negative. Having at least arguably established that Marshall had falsely answered the question (there was considerable dialogue over whether the question, phrased in the present tense, reached prior usage of drugs), the government had Marshall read the certificate that he had made in signing the document, which included this statement:

> I hereby certify that the answers to the above are true and correct. I understand that a person who answers any of the above questions in the affirmative is prohibited by Federal law from purchasing and/or possessing a firearm. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

Marshall did not object at the time to reading the certificate, which occurred at the end of a trial day. But, before court began the following morning, the trial judge instructed the government to make no further reference to the document. He noted that the jury had not seen it and expressed his view that the jury would not necessarily infer that it was a federal firearm transactions form. When court convened he gave an instruction to the jury limiting the testimony relating to the form and the certificate to the issue of Marshall's credibility.

[5] Marshall urges that this sequence of events inevitably prejudiced him by implying that he was guilty of a felony concerning firearms. We would be naive to accept the government's argument that having Marshall read the certificate was neutral and intended to do no more than show that he was not a credible person. That limited purpose could have been achieved by phrasing differently the questions addressed to Marshall, or by redaction, so that the document was not identified as relating to firearms and the certificate's reference to making a false statement as a felony was not revealed. The manner in which the evidence actually was presented does no credit to the prosecution. Nevertheless, under the circumstances it clearly was not reversible error.

[6, 7] The court refused Marshall's request for an instruction on credibility of an addict-informer.[3] See United States v. Collins, 472 F.2d 1017 (CA5), cert. denied, 409 U.S. 1011, 93 S.Ct. 437, 34 L.Ed.2d 306 (1972). This was not reversible error. The testimony of at least two of three addict-informers was substantially corroborated. See Govt. of Virgin Islands v. Hendricks, 476 F.2d 776 (CA3, 1973). Also, the requested instruction contained the phrase that "a drug addict is inherently a perjurer," which justified refusal of the charge. As the Third Circuit noted in *Hendricks*, this phrase would make the testimony incompetent altogether. 476 F.2d at 779.

The other contentions of the parties require no discussion. None reveal reversible error.

The convictions are affirmed.

3. The court did instruct that testimony of an informer testifying for pay or immunity or personal advantage must be examined and weighed with greater care than usual.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19 74

No. 74-2203

D. C. Docket No. CR-73-651-H

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HENRY FORREST MARSHALL and ROBERT DEMPSEY, III,

Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

Before AINSWORTH, GODBOLD and SIMPSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 27, 1975

Issued as Mandate: AUG 15 1975

APPENDIX B

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

August 7, 1975

TO ALL COUNSEL OF RECORD

Re: 74-2203 - U. S. A. vs. Henry Forrest Marshall, Robert Dempsey, III

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition(s) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

by Barbara Grei
Deputy Clerk

cc: Mr. Bernard A. Horton
Mr. George M. Papale
Messrs. Gerald J. Gallinghouse
Robert Habans
Mrs. Mary Williams Cazalas

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-360

HENRY FORREST MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-5391

ROBERT DEMPSEY, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were convicted of conspiring, in violation of 21 U.S.C. 846, to possess and distribute cocaine in violation of 21 U.S.C. 841(a)(1); petitioner Marshall was additionally convicted on two substantive counts charging distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). Marshall was given concurrent sentences of twelve years' imprisonment and a three-year special parole term on each count; petitioner Dempsey was sentenced to four years' imprisonment, consecutive to

an eight-year sentence he was then serving on another conviction, and a three-year special parole term. The court of appeals affirmed (Pet. No. 75-360, Apps. A, B).

Both petitioners contend that, under Wharton's Rule, their conviction for the substantive offenses barred conviction for the conspiracy. Marshall separately contends that the trial court erred by refusing his proffered instruction based upon Wharton's Rule and by denying him a mistrial because during cross-examination he was required to read aloud a federal firearms transaction form on which he had falsely denied being a narcotics user. Dempsey separately claims that his conviction for conspiracy constituted double jeopardy, since he had previously pleaded guilty to an indictment charging him with substantive offenses growing out of the same transaction.

1. The evidence showed three sales of cocaine by Dempsey to government informant Leonard Martin (the basis for the substantive indictment to which Dempsey previously pleaded guilty); a sale of cocaine by Marshall to one Booker T. Howard, Jr. (a co-defendant who pleaded guilty and testified as a government witness), which Howard resold in Chicago; and two sales of cocaine by Marshall to an undercover agent and another informer, Frederick Smith, which were arranged by Howard. A Drug Enforcement Administration chemist testified that the cocaine involved in the three sales to Martin and the two sales to Smith appeared to have a common source (II R. 84-89). Martin testified that Dempsey had identified Marshall as the source of the cocaine involved in one of Martin's purchases (II R. 126-128). Moreover, Dempsey had visited Marshall's apartment immediately prior to two of his sales to Martin (II R. 117-122, 193-198).

Petitioners do not dispute that from this evidence the jury could reasonably infer that Marshall provided the cocaine which Dempsey sold to Martin (see Pet. No. 75-5391 at 14-

15; Pet. No. 75-360 at 9). Their claim, instead, is that there was no showing that Marshall understood Dempsey to be other than an ultimate purchaser, and that under Wharton's Rule a buyer and seller cannot be guilty of a conspiracy to distribute. Marshall seeks to bring his own sales to Smith and the undercover agent within Wharton's Rule on the ground that Howard, because he was paid $200 by the undercover agent for arranging the sale, acted as the purchasers' rather than as Marshall's agent.

A. As recently explained in *Iannelli* v. *United States*, 420 U.S. 770, Wharton's Rule is an exception to the principle that conspiracy and the completed substantive offense are separate crimes. It is more a concept than a rule. *Id.* at 776. Under it, an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as necessarily to require the participation of two persons for its commission. In effect, the conspiracy is deemed to be merged into the substantive violation. *Id.* at 777-782. The Rule has been traditionally applied where agreement is essential to the substantive offense, and only the parties to the agreement are harmed. *Id.* at 782-784. *Iannelli* defines it as nothing more than a judicial presumption to aid statutory construction. It does not rest on double jeopardy concepts (*id.* at 782), and it is given effect only absent legislative intent to treat the substantive offense and the conspiracy as discrete crimes. *Id.* at 784-785.

In this case, the district court (VI R. 63) and the court of appeals (Pet. No. 75-360, App. A, 5755) correctly held that Wharton's Rule is inapplicable, and that no instruction concerning it was necessary. Contrary to petitioners' assumption, the substantive offense for which they were indicted—distribution of narcotics (21 U.S.C. 841)—does not require proof of agreement; the

offense of conspiracy to violate the Controlled Substances Act (21 U.S.C. 846) does require such proof. Distribution means "to deliver" (21 U.S.C. 802(11)) and "deliver" means "the actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship" (21 U.S.C. 802 (8)). The government need not prove that the actual or putative transferee consented to receive the contraband, although in most cases this will in fact be so. "Wharton's Rule applies only to offenses that *require* concerted criminal activity" (420 U.S. at 785; emphasis by the Court). Thus, because both crimes do not require proof of agreement, the existence, in a particular case, of substantial overlap in the proof offered to establish them does not defeat the inference that Congress intended to impose separate sanctions for separately defined offenses (*id.* at 785, n. 17).

The inference is even stronger here than in *Iannelli.* That case involved only the general conspiracy statute (18 U.S.C. 371) and a multiple-party gambling offense. In this case, however, the charge is violation of the special conspiracy provision Congress included in the Controlled Substances Act in addition to the substantive offenses defined in Section 841. Moreover, the harm resulting from agreements involving narcotics, like the gambling offenses involved in *Iannelli,* extends far beyond the parties to the agreement, and thus beyond the traditional rationale for Wharton's Rule. See 420 U.S. at 784. These factors indicate that Congress intended that conviction of the substantive offense, on proof in the particular case of collective criminal activity, does not dispense with liability for the conspiracy.

B. The evidence was sufficient to establish conspiracy as well as distribution. It was for the jury to decide

whether Howard's arrangement of the sale by Marshall to Smith and the undercover agent reflected an understanding between Marshall and Howard. Compare *United States* v. *Toombs*, 497 F. 2d 88, 94-95 (C.A. 5). As for the sales by Dempsey, the jury could reasonably infer from the circumstances, including the dates and frequency of the transactions (December 21, 1972, January 16 and January 19, 1973) and the amount involved (5.52 grams, 10.605 grams and 20.196 grams respectively), that Marshall was aware that Dempsey's purchases from him were not solely for personal use, but rather were for the purpose of further distribution.

2. Dempsey's conviction for conspiracy after previously having been convicted on his guilty plea of distribution, did not constitute double jeopardy. Conspiracy is a separate offense which is separately punishable. *Iannelli*, *supra*, 420 U.S. at 777-778; *United States* v. *Feola*, 420 U.S. 671, 693; *Callanan* v. *United States*, 364 U.S. 587, 593. There is no requirement that all offenses growing out of the same transaction be included in the same indictment and tried together, particularly when they involve different elements.[1] *Pulley* v. *Norvell*, 431 F.2d 258, 261 (C.A. 6), certiorari denied, 401 U.S. 916; *United States* v. *Smith*, 470 F.2d 1299, 1302 (C.A. 5), certiorari denied, 411 U.S. 952; *Moton* v. *Swenson*, 488 F.2d 1060, 1061-1063 (C.A. 8); *New Mexico* v. *Tijerina*, 86 N.M. 31, 519 P.2d 127, certiorari denied, 417 U.S. 956; *Wells* v. *Missouri*, 504 S.W. 2d 96 (Mo.), certiorari denied, 419 U.S. 1075.

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[1]Since petitioner pleaded guilty to the substantive offenses, he cannot claim collateral estoppel under *Ashe* v. *Swenson*, 397 U.S. 436.

3. The federal firearms transaction form was introduced into evidence to impeach Marshall's credibility; he had admitted on cross-examination that he was a narcotics user, and in executing the form he had denied using narcotics. The trial court instructed the prosecutor to make no further reference to the document, and instructed the jury that the testimony relating to it was to be considered only in regard to Marshall's credibility (see Pet. No. 75-360, App. A, 5755-5756). In view of the direct evidence linking Marshall to the sale of cocaine to the undercover agent and Smith, the court of appeals correctly concluded that no reversible error occurred (*id.* at 5756).

For the foregoing reasons, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

DOJ-1975-12